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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/702,098

11/05/2003

Joel D. Martz

3070A

6812

7590

07/05/2006

David M Warren  
655 Oakland Ave.  
Cedarhurst, NY 11516

EXAMINER

JUSKA, CHERYL ANN

ART UNIT

PAPER NUMBER

1771

DATE MAILED: 07/05/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	<b>Application No.</b>	<b>Applicant(s)</b>	
	10/702,098	MARTZ, JOEL D.	
	<b>Examiner</b>	<b>Art Unit</b>	
	Cheryl Juska	1771	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) ☒ Responsive to communication(s) filed on 04 April 2006.
- 2a) ☒ This action is **FINAL**.                      2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) ☒ Claim(s) 1-23 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-23 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                                   | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

## **DETAILED ACTION**

### ***Response to Amendment***

1. Applicant's amendment filed April 4, 2006, has been entered. Claims 1, 5, 7, 11-14, 18, and 23 have been amended as requested. The pending claims are 1-23.
2. Said amendment is sufficient to withdraw the 112, 2<sup>nd</sup> rejection set forth in sections 1-3 of the last Office Action. Additionally, said amendment is sufficient to withdraw the 102 rejection of claims 18-20 by the cited Ellis reference as set forth in section 5 of the last Office Action. Specifically, Ellis teaches an embodiment of a composite secondary backing comprising (a) a secondary backing adhered to a tufted primary backing and (b) a breathable film adhered to the opposite of said secondary backing. Applicant has limited the claims to a breathable membrane located between the primary and secondary backing, while the breathable membrane of Ellis is located on the outer surface of the secondary backing. Therefore, the claims are no longer anticipated.

### ***Claim Rejections - 35 USC § 103***

3. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.
4. Claims 1, 6, 14, 15-17 stand rejected under 35 USC 103(a) as being unpatentable over WO 01/98575 issued to Ellis et al. in view of US 5,612,113 issued to Irwin, Sr. as set forth in section 7 of the last Office Action.

Applicant's amendment to claim 1 clarifies the location of the breathable membrane between the primary backing and the secondary backing. This feature was addressed in section 7 of the last Office Action.

Applicant's amendment also limits the function of the secondary backing to protecting the breathable membrane from abrasion and for allowing transport of water vapor. However, it is argued that the claimed structural features of the secondary backing are met by the teachings of the prior art. As such, it follows that said secondary backing functions in the same manner. The location of the secondary backing with respect to the breathable membrane will inherently protect said membrane. Additionally, the nature and function of the secondary backing of the prior art inherently allows for transport of water vapor. In other words, the Ellis invention upon modification by the teachings of Irwin would result in a secondary backing that inherently protects the breathable layer from abrasion and allows for transport of water vapor. Hence, the new functional language is insufficient to overcome the prior art.

5. Claims 18-20 are rejected under 35 USC 103(a) as being unpatentable over WO 01/98575 issued to Ellis et al. in view of US 5,612,113 issued to Irwin, Sr.

Said claims were previously rejected as being anticipated by Ellis. Applicant's amendment limiting the carpet to including a secondary backing layer was sufficient to overcome the anticipation rejection. However, as argued in section 7 of the last Office Action, it would have been readily obvious to alter the location of the breathable film of Ellis per the teachings of Irwin. Thus, claims 18-20 are rejected for reasons analogous to those presented in section 7 of the last Office Action.

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6. Claims 2-4, 8-10, 16, 21, and 22 stand rejected under 35 USC 103(a) as being unpatentable over the cited Ellis and Irwin references and in further view of US 2002/0142126 issued to Higgins et al. as set forth in section 8 of the last Office Action.

***Allowable Subject Matter***

7. Claims 12, 13, and 23 stand objected to as containing allowable subject matter as set forth in section 9 of the last Office Action.

***Response to Arguments***

8. Applicant's arguments filed with the amendment have been fully considered but they are not persuasive.

9. Applicant traverses the rejection of the claims over Ellis in view of Irwin by asserting there is no motivation to combine the two references (Amendment, page 7, 1<sup>st</sup> paragraph). Specifically, applicant argues that the present claim feature of the secondary backing allowing for transport of water vapor while protecting the breathable membrane from abrasion contradicts the teachings of Irwin, which employs a liquid impervious material (Amendment, paragraph spanning pages 7-8 and page 8, 1<sup>st</sup> paragraph). This argument is unpersuasive because Irwin need not explicitly teach a breathable membrane. This feature is disclosed by Ellis. Irwin is relied upon to teach that a barrier layer (i.e., liquid impervious film) can be effective when located either between the primary and secondary backings or on the outer surface of the secondary backing. Note the liquid impervious film of Irwin is similar to the applicant's own liquid impervious membrane. The only difference is that the present membrane is also

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breathable (i.e., permeable to water vapor), while Irwin's membrane is not. This difference in the two barrier layers is immaterial to Irwin's teaching of equivalent barrier locations.

10. With regard to applicant's argument that the references fail to discuss the matter of protecting the barrier films from abrasion (Amendment, paragraph spanning pages 7-8 and 1<sup>st</sup> paragraph, page 8), it is reiterated that the Ellis invention upon modification by the teachings of Irwin would result in a secondary backing that inherently protects the breathable layer from abrasion due to the location of said secondary backing. Therefore, applicant's arguments are found unpersuasive and the above rejections stand.

### ***Conclusion***

11. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

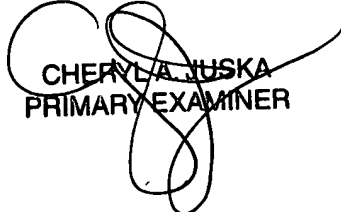
A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the date of this final action.

12. Any inquiry concerning this communication or earlier communications from the

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examiner should be directed to Cheryl Juska whose telephone number is 571-272-1477. The examiner can normally be reached on Monday-Friday 10am-6pm. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Terrel Morris can be reached at 571-272-1478. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

13. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

  
CHERYL A. JUSKA  
PRIMARY EXAMINER